HIGH COURT OF DELHI AT NEW DELHI

+ Crl.M.A.6746/2006

in

W.P.(Crl.) No.299/2001

Date of Decision: 21.09.2011

FORMOSA PLASTICS CORPN. USA ... Petitioner
Through: Mr.Vinay Garg &
Mr.Rajesh Yadav, Advs.
For Applicant in Crl.M.A.
No.6746/2006.

Versus

LT. GOVERNOR & ORS. ...Respondents
Through: Mr.Sunil Sharma, APP.

CORAM :
HON'BLE MR. JUSTICE V.K. SHALI

1. Whether Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

V.K. SHALI, J.

1. This order shall dispose of Criminal Miscellaneous Application bearing No.6746/2006, filed by one Arun Chauhan, under section 340 read with section 195 Cr.P.C. for initiating action against respondents/non-applicants, namely, Susan Wang, Director, Formosa Plastics Corporation of USA, Alice Nightingale, Assist. Vice-President, Legal Division & James A.Tidmarsh.

2. Briefly stated, the facts, leading to the filing of the present application are that petitioner/Formosa Plastics Corp., is alleged to have entered into a contract for supply of material S-PVC to M/s.Kunstoplast Inc., an American Company. It is alleged to have delivered material to the said company worth about 50 million US Dollars in Asia and Europe between 13.10.93 to 01.09.94. Ashok Chauhan is purported to have executed personal guarantees for all the claims of the petitioner

against the American Company. It is alleged that the guarantees were executed only with an intention to cheat the petitioner-company and the contracts, which were signed by Ashok Chauhan, on behalf of the said company. These documents were without any intention to fulfill the same. On 04.03.1994, it is alleged that the representatives of the petitioner-company met Ashok Chauhan in Germany to sort out the differences regarding non-payment of dues, whereupon Ashok Chauhan again represented to the petitioner-company that the company to which the goods were supplied was solvent and he himself had assets all over the world, which would be utilized as a guarantee for paying off the debts of the petitioner. Pursuant to this representation on 25.03.94, Ashok Chauhan is further purported to have executed guarantees afresh, i.e., just five days prior to his alleged fleeing away from Germany and three days before the seizure of his bank accounts and

properties. It is alleged that the fact of fleeing away and the seizure of the properties and bank accounts of Ashok Chauhan clearly showed his intention to cheat the petitioner-company. It is alleged that in April, 1994, a warrant of arrest was issued by the Criminal Court of Germany against Ashok Chauhan and his brother, Arun Chauhan. Fearing their arrest, it is alleged that both Ashok Chauhan and Arun Chauhan fled from Germany. The intention to defraud is further, stated to have been fortified from the fact that the Bills of Exchange and personal guarantees issued by these persons were not honoured. On 24.10.97, the petitioner is purported to have obtained a judgment from Civil Court both against Ashok Chauhan and the American company from Houston, Texas Court, which was subsequently alleged to have been made the judgment of English Courts.

3. In April, 1995, the petitioner-company filed a complaint to respondents No.2 & 3, i.e., Commissioner

of Delhi Police and DCP, Economic Offences Wing, Delhi for registration of a criminal case against Ashok Chauhan for offences of cheating etc. but no action was stated to have been taken by them, as a consequence of which petitioner-company filed a writ petition bearing No.299/2001, titled, *Formosa Plastics Corporation, USA Vs. Lt.Governor & Ors.*, seeking *mandamus*, against Lt.Governor of Delhi/Respondent No.1, Commissioner of Delhi Police/Respondent No.2, DCP, Economic Offences Wing, Delhi/Respondent No.3 and Union of India, through Secy. of Home Affairs, Ministry of Home Affairs/Respondent No.4 to register an FIR against the aforesaid persons.

4. This writ petition was filed on behalf of the petitioner-company, through James Tidmarsh, a resident of Geneva, Switzerland along with an affidavit in support of the petition. A copy of Special Power of Attorney, purported to have been executed by one Ms.Alice

Nightingale, working as a Corporate Secretary of the petitioner-company, in favour of James Tidmarsh authorizing him to pursue all the claims and legal interests of the company throughout the world, had also been filed.

5. This petition came up for hearing for the first time on 19.03.2001, on which date, it was adjourned to 21.03.2001, whereupon a notice to show cause as to why the petition may not be admitted was issued. The respondents filed their reply affidavits and contested the claim. Ultimately, on 13.08.2007, the learned counsel for the petitioner in view of the judgments of the Apex Court in *Aleque Padamsee & Ors. Vs. Union of India & Ors.,* **2007 (9) Scale 275,** sought permission to withdraw the petition with liberty to avail any such remedy as may be available to them in law. Before withdrawal of the writ petition, the aforesaid application No.6746/2006 was filed by the applicant/Arun Chauhan for initiation of

action under section 340 read with section 195 Cr.P.C. against Alice Nightingale, Corporate Secretary, James Tidmarsh, Attorney and Susan Wang, Director of the petitioner-company.

6. This application came up for hearing on 31.08.2007, when the matter was directed to be listed for arguments on the maintainability of the application. Since 31.08.2007, the application has been pending for final disposal. The order sheets shows that despite the plea having been taken by the learned counsel for the applicant that the question of maintainability of the application has already been considered and decided and notices were directed to be issued to the three respondents against whom action was sought to be taken under section 340 read with section 195 Cr.P.C. yet, *prima facie*, there is no speaking order on record, which would show that any such consideration has been given by the Court at any given point of time, except the

fact that notice has been issued to the respondents. The respondents are also stated to have been served. In any case, at this point of time, I feel that it would be necessary to go into the question of maintainability of the application, both on the question of locus as well as on merits so as to consider as to whether the application deserves to be proceeded ahead.

7. I have heard the learned counsel for the applicant.

8. The main contention of the learned counsel for the applicant is that the respondents in the application, namely, James Tidmarsh (through whom the present writ petition was filed), Alice Nightingale, who has delegated her authority to James Tidmarsh as well as Susan Wang, Director of the petitioner-company have committed an offence under section 195(1)(b)(i) of Cr.P.C. and, therefore, the said offence need to be dealt with by this Court under section 340 Cr.P.C.

9. Learned counsel, in order to support his submission, has contended that the present writ petition was essentially filed by the petitioner seeking a direction to the respondents to register an FIR against the applicant and Ashok Chauhan on account of the alleged offence of cheating and fraud having been committed by them, but a perusal of the affidavit as well as the power of attorney, on the basis of which, James Tidmarsh is purported to have derived his authority, would clearly show that he did not have any such authority. The only authority, which he had, was to act, bear, sign, verify or present the pleadings, replication, appeals, cross-objections, petitions, execution, review, revision, restoration or other petitions or affidavits or other documents as may be deemed necessary or proper for the prosecution of any case filed by the Company against any person in respect of the claim of the Company against its debtors (*emphasis added*) in India.

10. It was, therefore, contended since James Tidmarsh did not have any specific authority to initiate any criminal action, he could not have filed the present petition.

11. Secondly, it was contended that James Tidmarsh, as an attorney, only had a power to file a petition against its debtors in India, while as the applicant or his brother were not the debtors and, therefore, such a petition was filed against them on the basis of false documents and false information. It is contended that though no FIR was directed to be registered against the applicant or his brother by this Court and the petition was dismissed as withdrawn with liberty, as prayed for, yet on account of incorrect and false information being given by the petitioner's attorney and the other two persons, namely, Alice Nightingale and Susan Wang, the offence of perjury was complete and, therefore, they

deserve to be prosecuted under the aforesaid two sections.

12. So far as the question of locus is concerned, it has been contended by the learned counsel for the applicant that the offence of perjury or making a public servant to act on the basis of an information, which is false or incorrect, is an offence which can be activated either on the application as envisaged under section 340 Cr.P.C. or by the Court *suo motu.* It is contended that it is not the requirement of law that such an application should be filed by a person, who is a necessarily a party to the petition. In this regard, learned counsel for the applicant has placed reliance on *Patel Laljibhai Somabhai Vs. The State of Gujarat,* **1971 SCC (Crl.) 548** and *N.Natarajan Vs. B.K. Subba Rao,* **2003 (2) SCC 76**.

13. Learned counsel for the applicant in order to show that an action under the aforesaid two sections deserves

to be taken against the petitioner's attorney and his two other associates, viz., Alice Nightingale and Susan Wang, has placed reliance on *Iqbal Singh Marwah Vs. Meenakshi Marwah*, **2005 (4) SCC 370** and *Pritish Vs. State of Maharashtra & Ors.,* **2002 (1) SCC 253** as well as *Suo Motu Proceedings against R.Karuppan, Advocate: In Re,* **2001 (5) SCC 289** to urge that the Apex Court, in all the three cases, has taken a very serious view of the matter stating that, where the purity stream of justice is sought to be polluted by a party by giving wrong information, they deserves to be dealt with sternly.

14. I have carefully considered the submissions made by the learned counsel for the applicant. I do not have the opportunity of hearing any submissions from the side of the non-applicants, as none has appeared either in person or through counsel despite service, therefore, the matter is being decided on the basis of the submissions

made by the learned counsel for the applicant and after perusing the judgments of the Apex Court cited by the learned counsel for the applicant and the provisions of law.

15. Before dealing with the question as to whether an action deserves to be taken against the petitioner's attorney and his two associates, as urged by the learned counsel for the applicant, it would be worthwhile to reproduce the relevant provisions under which the action is sought to be taken by the Court against the said persons. Section 195(1)(b)(i)&(iii) reads as under:

> **"195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence.-**
>
> (1) No court shall take cognizance-
>
> (a) XXX XXX
>
> (b)
>
> (i) of any offence punishable under any of the following sections of the Indian Penal Code (45 of 1860), namely,

sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any court, or

(ii) XXX XXX

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), [except on the complaint in writing of that court or by such officer of the Court as that Court may authorize in writing in this behalf, or of some other court to which that court is subordinate]."

16. Similarly, section 340 Cr.P.C. deals with the procedure and reads as under:

"340. Procedure in cases mentioned in section 195:

(1) When upon an application made to it in this behalf or otherwise, any court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary,-

(a) record a finding to that effect;

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the first class having jurisdiction;

(d) take sufficient security for the appearance for the accused before such Magistrate, or if the alleged offence is

non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed, -

(a) where the court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorize in writing in this behalf;

(4) In this section, "Court" has the same meaning as in section 195."

17. A perusal of the section 340 Cr.P.C., would show that before any action under section 195 Cr.P.C. is taken, the Court must form an opinion that it is expedient in the interest of justice that an inquiry should be made into an offence referred to in clause (b) of sub-section (1) of section 195 Cr.P.C., which appears to have

been committed in or in relation to a proceeding before the Court in respect of a document produced or given in evidence. Therefore, firstly, the Court must form an opinion as to whether, it is expedient in the interest of justice that an inquiry must be held before proceeding under section 195(1)(b)(i)&(iii) and after holding preliminary inquiry, the Court can give a finding to that effect or can make a complaint thereafter in writing or send the matter to the Magistrate of First Class having the jurisdiction or take sufficient security for the appearance of the person before the Magistrate etc.

18. In the light of the aforesaid provisions of law, I feel before considering as to whether it is expedient to hold an inquiry in the instant case of the alleged offence of perjury having been committed by the respondents/non-applicants, it would be pertinent to refer to two judgments of the Apex Court in *Patel Laljibhai Somabhai's case (supra)* and *N.Natarajan's case (supra),*

which deals with the locus of the applicant under section 340 Cr.P.C.

19. In *Patel Laljibhai Somabhai's* case (supra), the appellant, i.e., Patel Laljibhai Somabhai had instituted a civil suit against the complainant for recovery of a sum of Rs.2,000/- on the basis of a forged cheque. The suit was dismissed for being false and thereafter a complaint was filed under sections 467 & 471 IPC in respect of which the Magistrate refused to take cognizance under section 195(1)(c), without there being a complaint by a Civil Court. It was observed by the Apex Court that the underlying purpose for enacting section 195(1)(b)&(c) and section 340 Cr.P.C. (section 476 of old Cr.P.C.) seems to be to control the temptation on the part of the private parties considering themselves aggrieved by the offence mentioned in those sections to start a criminal prosecution on frivolous, vexatious or insufficient

grounds inspired by a revengeful desire to harass or spite their opponents.

20. Similarly, in *N.Natarajan*'s case (supra), the Court took note of the fact that under criminal law a complaint can be lodged by anyone, who is aware of a crime having been committed and thereby set the law into motion and in respect of offences adverted to under section 195 Cr.P.C. There is a restriction that the same cannot be entertained unless a complaint is made by a Court because the offence is stated to have been committed in relation to the proceedings in that Court. It has been further observed that in ordinary crimes not adverted to under section 195 Cr.P.C., if in respect of any offence, the law can be set into motion by any citizen of this Country, we fail to see how any citizen of this country cannot approach under section 340 Cr.P.C.

21. Reference was made to the language of section 340 Cr.P.C. and it was observed that the Court has to act in the interest of justice on the basis of a complaint or otherwise and to that extent it was observed that the respondents in that case, who would be the applicants in the present case reported, were competent and have the locus to file the complaint.

22. So far as the law laid down by the Apex Court in these two authorities is concerned, there can be no dispute about the same. In *N.Natarajan's* case (supra), the Court has rightly observed that under criminal law anybody can be complainant, who may be aware of the offence. In the instant case also, the action under section 195, which is a substantive action, can be taken in terms of the procedure laid down under section 340 Cr.P.C., which can be activated by anybody on an application or by the Court *suo motu* but the primary purpose of initiation of such an action is that the Court

must form an opinion that it is expedient to hold a preliminary inquiry.

23. So far as the filing of an application by any person is concerned, it would obviously mean filing of an application provided there is an adjudication and a prima facie finding that the order has been obtained or passed or refused either on the basis of a false evidence or on the basis of documents produced by the party, which are false documents. This gets fortified by the judgment of the Apex Court in *Patel Laljibhai Somabhai's* case (supra), where suit for recovery was dismissed by observing that the suit was filed on the basis of a forged cheque.

24. Coming back to the facts of the present case, even if it is assumed for the sake of argument that applicant has the locus even then I feel that this is not a case where the Court on the basis of the affidavit and the

Special Power of Attorney, relied upon by the petitioner's attorney/James Tidmarsh has gone into the merits of the case and decided the question in either way by giving the direction to the police to register an FIR or dismissing the prayer. The petition itself was dismissed as withdrawn in the light of the law laid down by the Apex Court in *Aleque Padamsee's* case (supra), which is now re-affirmed by the Apex Court in Sakiri Basu Vs. State of U.P. & Ors., (2008) 2 SCC 409 case which lays down that a party who wants an FIR to be registered must approach the police either under Section 154(1) Cr.P.C. or under section 154(3) Cr.P.C. and if still the FIR is not registered, he can have appropriate remedies either by resorting to section 156(3) Cr.P.C. or by filing a criminal complaint under section 200 Cr.P.C.

25. It is, in this light, the writ petition was dismissed as withdrawn with liberty as prayed for. Under these circumstances, to initiate an action, when the applicant

himself is not aware as to whether the present petitioner has thereafter initiated any criminal action against the applicant or not, would only show that the present application is being filed with a view to deter them from taking any action against the alleged offenders. This in the language of the Supreme Court *Patel Laljibhai Somabhai's* case (supra) is a frivolous, vexatious prosecution by the present applicants which is inspired by a revengeful desire to harass or spite their opponents namely, the James Tidmarsh and others. Therefore, I feel that the filing of the present application at this stage is premature.

26. Secondly, if one sees the affidavit and the power of attorney, the main contention, which has been urged before this Court is that the power of attorney, which was relied upon by James Tidmarsh was essentially for initiating a suit or a petition against debtors and not for the purpose of filing of the criminal complaint and since

the power of attorney has been relied upon by the petitioner, therefore, not only he but the person, who has conferred that power of attorney as well as Susan Wang, Director, are guilty of having filed a case on the basis of a false document. I do not subscribe to this view that the petitioner is guilty of filing the petition on the basis of a false information by relying upon the power of attorney which allegedly does not confer upon them to file the present writ petition. This would be evident in case the entire document is read in its entirety. The recital of the power of attorney clearly show that James Tidmarsh had been appointed as an attorney by Alice Nightingale, Corporate Secretary of the petitioner-company for and on behalf of the company to pursue the claims of the petitioner-company against all the debtors throughout the world. All the legal interests have been purposefully highlighted by him, which would show that in case the petitioner-company is alleged to

have been cheated by any person and any action is necessitated to bring the guilty to the book it will fall within the terminology legal interests of the petitioner-company. Therefore, the recital makes it clear that the petitioner's attorney/James Tidmarsh was appointed for the purpose of protection of the legal interests of the company and for this purpose he was permitted to file the petition under Clause 1 of the power of attorney. In the said power of attorney, he was authorized to make statements on their behalf in Court of law, sign petitions, act and instruct legal practitioners and to approach all courts, original or appellate, therefore, the sum and substance of the entire power of attorney was to clothe the attorney James Tidmarsh to take all such similar criminal actions, which may be permissible in local law of India to protect the interests of the petitioner-company, which he has actually done. I do not find that by any stretch of imagination, it can be said that the intention of

the petitioner's attorney was to base its claim either on the false documents or false averments sworn in the affidavit.

27. On the contrary, I get the impression that the application filed by the applicant, under section 340 Cr.P.C. read with section 195 Cr.P.C., is being used by the applicant only as a shield to deter the rightful processes of law to have their own course. Merely because the applicant has the capacity to engage a counsel and fight a legal battle, he has chosen ingenious method of embarking on a speculative litigation so as to deter the petitioner-company.

28. I, therefore, in the aforesaid facts and circumstances feel that it is not expedient to conduct any preliminary inquiry in the matter as the writ petition itself has not been decided on merits. I am of the view that the present application has been purposefully filed

against James Tidmarsh/respondent No.1 and his two other associates/respondents No.2 & 3, viz., Alice Nightingale and Susan Wang so as to keep the Damocles' sword hanging on their head. I, accordingly, feel that the present application is neither maintainable nor is it expedient so as to warrant holding of an inquiry under section 340 Cr.P.C.

29. So far as the other three judgments[1], which have been referred by the learned counsel for the applicant are concerned, I have gone through the same. There is no dispute about the proposition of law laid down in the said judgments, however, merely because the Apex Court has observed that the offence of perjury is a serious act and in a given case an action has been initiated against the party under section 195 read with section 340 Cr.P.C. does not necessarily mean that in other case where alien allegation is being made, the

[1] **2005 (4) SCC 370*;* 2002 (1) SCC 253; 2001 (5) SCC 289**

Court must embark on such an inquiry with a view to satisfy the whims and fancies of a party. Notable in all the judgments is the judgment of *Suo Motu Proceedings against R.Karuppan's case* (supra) where the affidavits were filed with regard to the date of birth of the Ex-Chief Justice, wherein certain observations made by the Apex Court can certainly cannot be made applicable to the facts of the present case, where the applicant is a private party and not holder of high public office.

30. For the reasons, mentioned above, I feel that the application filed by the applicant is totally misconceived and accordingly, the same is dismissed.

31. Since continuance of this application, by keeping the application alive for almost four years after withdrawal of the writ petition on 13.08.2007, has resulted in wastage of considerable time of the Court and as well as that of the Registry, I feel that the Court

must impose costs to deter not only the applicants or the persons of such proclivities and having resources to indulge in speculative litigation to keep their opponents at bay from initiating legal action. Accordingly, I impose costs of Rs.1 lakh on the applicants, which shall be deposited by them with the Delhi High Court Legal Services Committee within a period of four months, failing which the matter will be placed before Registrar (Criminal), who may effect recovery of the aforesaid amount in terms of section 421 Cr.P.C.

V.K. SHALI, J.

September 21st, 2011
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